Jalang anak Paran & Anor v Government of the State of Sarawak & Anor

HIGH COURT (KUCHING) — CIVIL SUIT NO 22–99 OF 1999–III(I)
DAVID WONG J
29 SEPTEMBER 2006

Administrative Law — Exercise of administrative powers — Judicial review — Minister's direction — Extinguishment of the native customary rights — No specific provision requiring Minister to disclose purpose of extinguishment — Whether Minister under a duty to disclose

Civil Procedure — Action — Forms and procedure — Statement of claim in substance challenged the decision of the Minister — Whether a disguise for an application for a writ of certiorari — Whether action should have been brought by way of judicial review

Constitutional Law — Right to property — Native customary rights over land — Extinguishment of — Whether can be taken away by laws passed by the Federal Parliament or State Legislature

Native Law and Custom — Land dispute — Customary rights over land — Native customary rights over land — Adequate compensation — Land Code Cap 81, 5(3), (4), Federal Constitution art 13(2)

The plaintiffs' native customary rights were extinguished by the first defendant through the minister in a direction dated 6 February 1997. The plaintiffs took this action against the defendants challenging the validity or constitutionality of the direction. The ground for this challenge is that the enabling sections of the Land Code Cap 81 (Land Code) for the direction are invalid on the ground that they infringe the provisions of the Federal Constitution under arts 5, 8, 13(2) and 153 or art 39 of the Sarawak State Constitution.

Held, dismissing plaintiff's claim with cost to be taxed unless agreed:

(1) Native customary rights can be taken away by laws passed by the Federal Parliament or State Legislature provided that the languages employed therein are clear and unambiguous and also compensation is paid for the extinguishment (see *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256)). The issue is whether s 5(3) and (4) of the Land Code (impugned sections) satisfy the provisos.

As long as the impugned sections contain a provision for payment of compensation for the extinguishment of the native customary rights, the same cannot be attacked for being unconstitutional. The payment of compensation is a basic requirement as provided for by art 13(2) of the Federal Constitution. Therefore, s 5(3) and (4) of the Sarawak Land Code do not violate art 5 of the Federal Constitution and hence a valid piece of legislation (see para 9).

(2) There is no allegation by the plaintiffs that the minister had misused or abused his power in issuing the direction. There is in fact no impediment to the plaintiffs from making an application for a writ of certiorari to quash the decision of the minister as there is no 'ouster clause' for judicial review in the Land Code. Since there is no challenge it can only be assumed that there has been no abuse or misuse of power by the minister (see para 16).

(3) By s 15A (1) and (2) of the Sarawak Land Code, the first defendant can extinguish native customary rights only if the land is required for development or undertaking which is in the opinion of the minister is for the benefit of the state or a public purpose. It is not disputed by counsels on both sides that there is no specific provision requiring the first defendant to disclose the purpose of the extinguishment which is understandable as there can be only one purpose for extinguishment, which is a public purpose. Be that as it may, one can and should imply that the minister is under a duty to disclose the reason of the extinguishment and failure to do so would be a breach of a statutory duty on the part of the minister. It is a basic constitutional right of every citizen to be informed of the reason whenever their rights are being affected by any public body, otherwise their constitutional rights to challenge would be meaningless (see para 25).

(4) In the present case, the minister in the direction did refer to the use of a 'Pulpwood Mill Site at Ulu Batang Tatau', and hence the minister had by the aforesaid reference complied with his statutory duty to disclose. There is no necessity to state that the 'Pulpwood Mill Site' is for a public purpose as the law deems it to be so. Whether or not the intended purpose is a public purpose is subject to challenge in the courts by the plaintiffs (see para 25).

(5) The statement of claim had in substance challenged the decision of the minister which is a disguise for an application for a writ of certiorari. That being the case, the plaintiffs ought to have applied for judicial review of the decision of the minister under O 53 Rules of the High Court. The plaintiffs had ran foul of the principle of law expounded in *Shaharuddin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor* [2005] 2 MLJ 555 when they did not use the judicial review route in quashing the minister's decision. On the same grounds, it would not be proper to deal with this issue (see para 21).

[Bahasa Malaysia summary

Hak-hak adat anak tempatan plaintif-plaintif telah dihapuskan oleh defendan pertama melalui satu Arahan Menteri bertarikh 6 Februari 1997. Plaintif-plaintif mengambil tindakan ini terhadap defendan-defendan mencabar kesahan atau keperlembagaan Arahan tersebut. Alasan cabaran ini ialah seksyen yang

membolehkan arahan tersebut di Kanun Tanah Bab 81 (Kanun Tanah) adalah tidak sah atas alasan bahawa ia melanggar peruntukan-peruntukan Perlembagaan Persekutuan di bawah perkara 5, 8, 13(2) dan 153 atau perkara 39 Perlembagaan Negeri Sarawak.

Diputuskan, menolak tuntutan plaintif dengan kos untuk ditaksirkan melainkan dipersetujui:

(1) Hak-hak adat penduduk tempatan boleh dikecualikan menurut undang-undang yang diluluskan oleh Parlimen Persekutuan atau Dewan Undangan Negeri sekiranya bahasa yang digunakan di dalamnya adalah jelas dan tidak kabur dan juga pampasan diberikan bagi penghapusan tersebut (lihat *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256). Isu ialah sama ada s 5(3) dan (4) Kanun Tanah (seksyen yang dipersoalkan) memenuhi kehendak proviso-proviso. Selagi seskyen yang dipersoalkan mengandungi peruntukan untuk bayaran pampasan untuk penghapusan hak-hak adat penduduk tempatan, ia tidak boleh dipertikai atas sebab tidak mengikut berperlembagaan. Bayaran pampasan adalah satu keperluan asas seperti yang diperuntukkan oleh perkara 13(2) Perlembagaan Persekutuan. Dengan ini s 5(3) dan (4) Kanun Tanah Sarawak tidak mencabuli perkara 5 Perlembagaan Persekutuan dan dengan itu adalah suatu undang-undang yang sah (lihat perenggan 9).

(2) Tiada dakwaan oleh plaintif-plaintif bahawa menteri tersebut menyalahgunakan kuasanya dalam mengeluarkan arahan tersebut. Sebenarnya tiada halangan untuk plaintif-plaintif membuat satu permohonan untuk writ certiorari membatalkan keputusan Menteri oleh kerana tiada klausa penyingkiran untuk kajian semula kehakiman di dalam Kanun Tanah tersebut. Oleh kerana tiada cabaran ia hanya dapat dianggap bahawa tiada penyalahgunaan kuasa oleh Menteri tersebut (lihat perenggan 16).

(3) Melalui s 15A (1) dan (2) Kanun Tanah Sarawak, defendan pertama boleh menghapuskan hak-hak adat anak watan hanya jika tanah itu diperlukan untuk pembangunan atau akujanji menteri di mana pada pendapat menteri tersebut adalah untuk faedah negeri atau untuk tujuan awam. Tidak dipertikaikan oleh peguamcara-peguamcara kedua-dua pihak bahawa tiada peruntukan spesifik yang memerlukan defendan pertama mendedahkan tujuan penghapusan di mana ia dapat difahamkan bahawa hanya terdapat satu tujuan untuk penghapusan, iaitu tujuan awam. Walaupun begitu, ia harus dicadangkan bahawa adalah tanggungjawab menteri tersebut mendedahkan alasan penghapusan dan kegagalan berbuat demikian adalah satu pelanggaran kewajipan statutori pada pihak menteri tersebut. Adalah hak di bawah perlembagaan untuk setiap warganegara negara ini dimaklumkan alasan apabila hak-hak mereka terjejas oleh sebarang badan awam, jika tidak hak-hak perlembagaan mereka untuk mencabarkannya akan menjadi tidak bermakna (lihat perenggan 25).

(4) Dalam kes ini, menteri di dalam arahannya merujuk kepada pengunaan 'Pulpwood Mill Site at Ulu Batang Tatau', dan dengan itu menteri tersebut dengan rujukan tersebut mematuhi tanggungjawab statutorinya untuk

mendedahkannya. Tiada keperluan untuk menyatakan bahawa 'Pulpwood Mill Site' adalah satu tujuan awam oleh kerana undang-undang menganggapnya sedemikian. Sama ada tujuan yang diniatkan adalah tujuan awam boleh dicabar di mahkamah oleh plaintif-plaintif (lihat perenggan 25).

(5) Bahagian utama pernyataan tuntutan telah mencabar keputusan menteri tersebut yang menyamarkan sebagai permohonan untuk writ certiorari. Disebabkan begitu, plaintif-plaintif sepatutnya memohon kajian semula kehakiman terhadap keputusan menteri tersebut di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi. Plaintif-plaintif telah melanggar prinsip undang-undang seperti yang dinyatakan di kes*Shaharuddin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor* [2005] 2 MLJ 555 apabila mereka tidak menggunakan jalan kajian semula kehakiman dalam membatalkan keputusan menteri tersebut. Atas alasan yang sama, ia adalah tidak sesuai untuk berurusan dengan isu ini (lihat perenggan 21).]

Notes

For cases on exercise of administrative powers for judicial review, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 46–71.

For cases on forms and procedure, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 126.

For cases on native customary rights over land, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 632–639.

Cases referred to

Datuk Haji Harun bin Haji Idris v PP [1977] 2 MLJ 155 (refd)
Hong Leong Equipment v Liew Fook Chuan [1996] 1 MLJ 481 (refd)
Kerajaan Negri Johor & Anor v Adong Kuwau & Ors [1998] 2 MLJ 158 (refd)
Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors [2005] 6 MLJ 289 (refd)
Lord Chesham Cavendish, Re v Dacre [1886] 31 Ch D 466 (refd)
O'Reilly v Mackman [1983] 2 AC 237 (refd)
PP v Tan Tatt Eek and other appeals [2005] 2 MLJ 685 (refd)
Shaharuddin bin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor [2005] 2 MLJ 555 (folld)
Shim Tshun Fatt v PP [2001] 5 MLJ 40 (refd)
Superintendent of Lands & Surveys, Bintulu v. Nor Anak Nyawai & Ors and another appeal [2006] 1 MLJ 256 (folld)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)

Legislation referred to

Aborigines Peoples Act 1954 ss 11 and 12
Federal Constitution Arts 5, 8, 13(2), 153
Rules of the High Court 1980 O 53
Sarawak Land Code Cap 81 ss 5(3), (4), 46(a), (g)
Sarawak State Constitution art 39

Baru Bian (See Chee How and Encik Mohideen Abdul Kader with him) for the plaintiff.
Haji Abdul Razak Tready (Sabwati Balia with him)(State Attorney Office) for the first defendant.

David Wong J:

PROCEEDINGS

[1] On 29 April 1999, the plaintiffs took this action against the defendants and their claim is basically one of challenge to the validity or constitutionality of the Land (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No 3) Direction 1997 ('Direction') issued by the Minister for Resource Planning (minister). In their pleadings, they claim the following:

> A declaration that the purported extinguishment of the plaintiffs' native customary rights, pursuant to the Land (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No 3) Direction 1997 made by the minister for Resource Planning in Sarawak Government Gazette Notification No 388B on the 13 day of February 1997, is bad and null and void
>
> (See p 16 of Bundle of Pleadings)

[2] The ground for this challenge is that the enabling sections of the Land Code Cap 81 ('Land Code') for the direction are invalid on the ground that they infringe the provisions of the Federal Constitution under arts 5, 8, 13(2) and 153 or.

[3] When this matter was case managed by this court on 16 January 2006, I asked counsels whether or not it can be tried without the calling of oral evidences. On the 18 January 2006, after consultation among counsels, they informed me that they concluded and then agreed that the trial of this suit can be done in the following manner:

(a) based on the agreed issues, facts and the bundle of documents prepared and submitted by the parties;

(b) without oral evidences; and

(c) based on written and oral submissions.

[4] Pursuant to aforesaid agreement, counsels tendered their respective submissions (all together nine in numbers) over a period of five months based on the mutual consents of counsels. I then fixed 3 July 2006 for oral clarification of counsels' respective submissions.

AGREED FACTS

[5] These are contained in encl 95 which I do not intend to reproduce herein as not all the agreed facts are relevant to the agreed issues but whenever they are relevant I will set them out at the appropriate place. However, briefly the facts are these. The plaintiffs' native customary rights were extinguished by the first defendant through the minister in a direction dated 6 February 1997 (direction) which is produced herein:

SARAWAK GOVERNMENT GAZETTE

512–D 13 February 1997

THE LAND CODE

THE LAND (EXTINGUISHMENT OF NATIVE CUSTOMARY RIGHTS) (PULPWOOD MILL SITE AT ULU BATANG TATAU) (NO 3) DIRECTION, 1997

(Made under s 5(3) and (4))

In excercise of the powers conferred by s 5(3) and (4) of the Land Code (Cap 81), the Minister for Resource Planning has made the following direction:

1. This direction may be cited as the Land (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No 3) Direction, 1997, and shall come into force on the 15th day of february, 1997.

2. On the day of coming into force of this direction, all native customary rights that may be claimed or have subsisted over the land situated at Ulu Batang Tatau, Tatau, and more particularly described in the Schedule below, shall be extinguished and the land held under any such rights shall revert to the Government of Sarawak.

3. Any person who desires to make any claim for compansation as a consequence of the extinguishment of native customary rights belonging to, enjoyed or claimed by him over the said land must, within sixty (60) days from the date of publication in the *Gazette* or exhibition at the District Office at Tatau of this direction, submit his claim, together with evidence in support thereof, to the Suprintendent, Land and Survey Department, Bintulu Division, Bintulu, in a form prescribed by the Suprintendent at obtainable from his Office at the Land and Survey Divisional Office, Bintulu.

SCHEDULE

All that area of land situated at ulu batang tatau, tatau as more particularly described on the Plan Print No 73/9D/8/96 and edged thereon in red.

(the abovementioned Plan may be inspected at the Office of the Suprintendent of Lands and Surveys, Bintulu Division, Bintulu, and at the District Office at Tatau)

Made by the minister this 6th day of February 1997.

HAJI ZAIDI K ZAINIE

KPS/S/T/2–169/6 Permanent Secretary, Ministry of Resource Planning

[6] The plaintiffs now challenge the legality of the direction on grounds as set out earlier.

AGREED ISSUES

1. Whether or not the reference by the 16 plaintiffs in item 6.4 of the Agreed Facts and Issues to arbitration is deemed to be an acceptance of the extinguishment of their native customary rights to their respective lots under

the s 5(3) and (4) of the Land Code? (Of the 16 plaintiffs, 13 had accepted payment of compensation which leaves only three plaintiffs for the purpose of this trial)

2. Whether s 5(3) of the Sarawak Land Code requires the Director of Lands and Surveys to expressly stipulate the purpose for the extinguishment of the native customary rights over the State Land in question, and if so, whether the reference to 'Pulpwood Mill Site' is sufficient to satisfy this requirement?

3. Whether, having regard to the circumstances and the objectives of establishing the Pulpwood Mill, through a Joint Venture Company, where STIDC is a joint venture partner, the purpose is a 'public purpose' bearing in mind the definition of 'public purpose' in s 46(a) and (g) of the Sarawak Land Code?

4. Whether the provisions in the Sarawak Land Code as provided in s 5(3) and (4) and any direction made there under violate the provisions of the Federal Constitution under arts 5, 8, 13(2) and 153 or art 39 of the Sarawak State Constitution?

FINDINGS OF THE COURT

Issue 4

[7] I shall deal with this issue first as whatever findings I make will have a major bearing on the other issues. The relevant legislations sought to be impugned read as follows:

Section 5(3)(a) of the Sarawak Land Code

Any native customary rights may be extinguished by direction issued by the minister which shall be

(i) published in the gazette and one newspaper circulating in Sarawak; and

(ii) exhibited at the notice board of the District Office for the area where the land, over which such rights are to be extinguished is situate, and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the government:

Provided that -where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights in accordance with paras (b) and (c); or other land over which such rights may be exercised may be made available to him — with or — without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

Section 5(3) (b)

Any person who desires to make any claim for compensation must submit his claim with evidence in support thereof to the superintendent, in a form to be prescribed by him, within such period as may be stipulated in the direction issued by the minister under paragraph (a), provided so stipulated shall not be less than sixty days from the date of publication or exhibition thereof.

A Section 5(3) (c)

No claim for compensation for extinguishment of native customary rights shall be entertained by the superintendent unless such claim is submitted within the period stipulated in para (b).

B Section 5(4) (a) (iii)

Any person who is dissatisfied with any decision made by the superintendent under subs (3) on the ground that

C (i) (Not relevant)

(ii) (Not relevant)

(iii) the amount or apportionment of compensation is inadequate, unfair or unreasonable may within twenty-one days from the date of receipt of the decision of the superintendent, by notice in writing addressed to the superintendent, require the manner to be referred to arbitration in accordance -with s 212.

D *Constitution Provisions:*

Article 5(1) reads:

E No person shall be deprived of his life or personal liberty save in accordance with law.

Article 8 reads:

(1) All persons are equal before the law and entitled to the equal protection of the law.

F (2) Except as expressly authorized by this constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

G Article 13(1) reads:

No person shall be deprived of property save in accordance with the law

H Article 13(2) reads:

No law shall provide for the compulsory acquisition or use of property without adequate compensation.

I Article 153 reads:

Reservation of quotas in respect of services, permits, etc., for Malays and natives of any of the States of Sabah and Sarawak.

(1) It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this article.

(2) Notwithstanding anything in this constitution, but subject to the provisions of art 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a state) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this article, of such permits and licences.

(3) The Yang di-Pertuan Agong may, in order to ensure in accordance with cl (2) the reservation to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities, give such general directions as may be required for that purpose to any commission to which Part X applies or to any authority charged with responsibility for the grant of such scholarships, exhibitions or other educational or training privileges or special facilities; and the commission or authority shall duly comply with the directions.

(4) In exercising his functions under this constitution and federal law in accordance with cll (1) to (3) the Yang di-Pertuan Agong shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him.

(5) This article does not derogate from the provisions of art 136.

(6) Where by existing federal law a permit or licence is required for the operation of any trade or business the Yang di-Pertuan Agong may exercise his functions under that law in such manner, or give such general directions to any authority charged under that law -with the grant of such permits or licences, as may be required to ensure the reservation of such proportion of such permits or licences for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

(7) Nothing in this article shall operate to deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him or to authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of a person any permit or licence when the renewal or grant might reasonably be expected in the ordinary course of events.

(8) Notwithstanding anything in this constitution, where by any federal law any permit or licence is required for the operation of any trade or business, that law may provide for the reservation of a proportion of such permits or licences for Malays and natives of any of the states of Sabah and Sarawak; but no such law shall for the purpose of ensuring such a reservation:

(a) deprive or authorise the deprivation of any person of any right, privilege, permit or licence accrued to or enjoyed or held by him; or

(b) authorise a refusal to renew to any person any such permit or licence or a refusal to grant to the heirs, successors or assigns of any person any permit or licence when the renewal or grant might in accordance with the other provisions of the law

reasonably be expected in the ordinary course of events, or prevent any person from transferring together with his business any transferable licence to operate that business; or

(c) where no permit or licence was previously required for the operation of the trade or business, authorise a refusal to grant a permit or licence to any person for the operation of any trade or business which immediately before the coming into force of the law he had been bona fide carrying on, or authorise a refusal subsequently to renew to any such person any permit or licence, or a refusal to grant to the heirs, successors or assigns of any such person any such permit or licence when the renewal or grant might in accordance -with the other provisions of that law reasonably be expected in the ordinary course of events.

(8A) Notwithstanding anything in this constitution, where in any university, college and other educational institution providing education after Malaysian Certificate of Education or its equivalent, the number of places offered by the authority responsible for the management of the university, college or such educational institution to candidates for any course of study is less than the number of candidates qualified for such places, it shall be lawful for the Yang di-Pertuan Agong by virtue of this article to give such directions to the authority as may be required to ensure the reservation of such proportion of such places for Malays and natives of any of the States of Sabah and Sarawak as the Yang di-Pertuan Agong may deem reasonable; and the authority shall duly comply with the directions.

(9) Nothing in this article shall empower parliament to restrict business or trade solely for the purpose of reservations for Malays and natives of any of the states of Sabah and Sarawak.

(9A) In this article the expression 'natives' in relation to the state of Sabah or Sarawak shall have the meaning assigned to it in art 161 A.

(10) The constitution of the state of any ruler may make provision corresponding (with the necessary modifications) to the provisions of this article.

[8] The starting point must be for me to determine what kind of rights are native customary rights in the context of Sarawak. Encik Mohideen Abdul Kader, one of the counsels for the plaintiffs, submitted that native customary rights are fundamental rights which are protected by art 5 of the Federal Constitution. He also submitted that they are more than a right to property and in fact are a right to life which encompasses the right to livelihood and all the facets that are integral part of life itself. For this submission he relied on the case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 and *Hong Leong Equipment v Liew Fook Chuan* [1996] 1 MLJ 481. As much as I would like to engage in a discussion with learned counsel on his submission, I am duty bound to follow what is stated by the Court of Appeal in *Superintendent of Lands & Surveys, Bintulu v Nor Anak Nyawai & Ors and another appeal* [2006] 1 MLJ 256, where it described native customary rights as thus;

(a) that the common law respects the pre-existence of rights under native laws or customs though such rights may be taken away by clear and unambiguous words in a legislation;

(b) that native customary rights do not owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights have been extinguished;

(c) that the Sarawak Land Code does not abrogate whatever native customary rights that exist before the passing of that legislation. However natives are no longer able to claim new territory without a permit under s. 10 of that legislation from the Superintendent of Lands & Surveys'; and

(d) that although the natives may not hold any title to the land and may be termed licencees, such licence cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is afterpayment of compensation.

[9] The principle distilled from the above is this. Native customary rights can be taken away by laws passed by the Federal Parliament or State Legislature provided that the languages employed therein are clear and unambiguous and also compensation is paid for the extinguishment. The issue which confronts me now is whether s 5(3) and (4) of the Land Code (impugned sections) satisfy the aforesaid provisos. There is no doubt in my mind that anyone reading the impugned sections would have a clear understanding what they mean and it is this. The minister is given the power to extinguish native customary rights and in doing so must compensate the natives for doing so. A mechanism for the amount of compensation to be paid is also provided for in the impugned sections. In my view, as long as the impugned sections contain a provision for payment of compensation for the extinguishment of the native customary rights, the same cannot be attacked for being unconstitutional. The payment of compensation is a basic requirement as provided for by art 13(2) of the Federal Constitution. In the case of *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors* [2005] 6 MLJ 289, the Court of Appeal was confronted with the legality of ss 11 and 12 of the Aborigines Peoples Act 1954 which provides as follows:

Section 11:

(1) Where an aboriginal community establishes a claim to fruit or rubber trees on any state land which is alienated, granted, leased for any purpose, occupied temporarily under licence and other wise disposed of, then such compensation shall be apid to that aboriginal community as shall appear to the State Authority to be just.

(2) Any compensation payable under subsection (1) may be paid in accordance with s 12.

Section 12:

If any land is excised from any aboriginal area or aboriginal reserve or if any land in any aboriginal area is alienated, granted, leased for any purpose or otherwise disposed of, or if any right or privilege in any aboriginal area or aboriginal reserve granted to any aborigine or aboriginal community is revoked wholly or in part, the State Authority may grant compensation therefor and may pay such compensation to the persons entitled in his opinion thereto or may, if he thinks fit, pay the same to the Director General to be held by him as a common fund for such persons or for such aboriginal community as shall be directed, and to be administered in such manner as may be prescribed by the minister.

[10] In dealing with the issue, Gopal Sri Ram JCA said:

A statute which confers a discretion on an acquiring authority whether to pay compensation or not enables that authority not to pay any compensation. It is therefore a law that does not provide for the payment of adequate compensation and that is why s 12 will be

unconstitutional. Such a consequence is to be avoided, if possible, because a court in its constitutional role always tries to uphold a statute rather than strike it down as violating the Constitution. As Jeevan Reddy J said in *State of Bihar & Ors v Bihar Distillery Ltd* AIR [1997] SC 1511:

> 'The approach of the court, while examining the challenge to the constitutionality of an enactment, is to start with the presumption of constitutionality. The court should to try to sustain its validity to the extent possible. It should strike down the enactment only when it is not possible to sustain it.
>
> How then do you modify' s 12 to render it harmonious with art 13(2)? I think you do that by reading the relevant phrase in s 12 as the State Authority shall grant adequate compensation therefor. By interpreting the word 'may' for 'shall' and by introducing 'adequate' before compensation, the modification is complete. I am aware that ordinarily we, the judges, are not permitted by our own jurisprudence, to do this. But here you have a direction by the supreme law of the federation that such modifications as the present must be done. That is why we can resort to this extraordinary method of interpretation.

[11] Also in the case of *Kerajaan Negeri Johor & Anor v Adong Kuwau & Ors* [1998] 2 MLJ 158, the Court of Appeal in dealing with deprivation of native customary rights said:

> The learned judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the Federal Constitution.

[12] The rationale therefore is where there is legislation for extinguishment of native customary rights, so long as there is payment of adequate compensation; the said legislation is safe from constitutional attack. For reasons stated above, I hold that s 5(3) and (4) of the Sarawak Land Code do not violate art 5 of the Federal Constitution and hence a valid piece of legislation.

[13] Counsel for the plaintiffs had also submitted that the impugned sections are discriminatory when compared to Part IV of the Sarawak Land Code which deals with acquisition procedures for titled lands. Hence counsel submitted that the impugned sections infringe art 8 of the Federal Constitution. On this issue, I agree with counsel for the first defendant who contended that there is no discrimination as the impugned sections confined themselves to non titled lands held by natives only while Part IV is confined to titled lands held by natives as well as non natives. From my reading, the impugned sections treat all natives the same while Part IV treats all holders (whether natives or non natives) of titled lands the same, hence with respect I see no discrimination in the impugned sections. In *Datuk Haji Harun bin Haji Idris v Public Prosecutor* [1977] 2 MLJ 155 Suffian LP in relation to art 8 of the Federal Constitution said this:

> ... In my opinion, the law may classify persons into children, juveniles and adults, and provide different criteria for determining their criminal liability or the mode of trying them

or punishing them if found guilty; the law may classify persons into women and men, or into wives and husbands, and provide different rights and liabilities attaching to the status of each class; the law may classify offences into different categories and provide that some offences be triable in a magistrate's court, others in a sessions court, and yet others in the high court; the law may provide that certain offences be triable even in a military court; fiscal law may divide a town into different areas and provide that ratepayers in one area pay a higher or lower rate than those of another area, and in the case of income tax provide that millionaires pay more tax than others; and yet in my judgment in none of these cases can the law be said to violate art 8. All that art 8 guarantees is that a person in one class should be treated the same as another

person in the same class, so that a juvenile must be tried like another juvenile, a ratepayer in one area should pay the same rate as paid by another ratepayer in the same area, and a millionaire the same income tax as another millionaire, and so on.

[14] Further, Mr Baru Bian, one of the counsels for the plaintiff in enclosure 100 submitted that the impugned sections are unconstitutional as they do not provide for any criteria as how compensation should be calculated bearing in mind that native customary rights comprise not only of the plaintiffs' property but also their very livihood. With respect I beg to differ. The fact that there are no criteria provided for in the impugned sections actually favors the plaintiffs in that the plaintiffs at the arbitration hearing for compensation are not hindered from putting forth what they consider relevant criteria in assessing the compensation.

[15] Finally, on the submission that the first defendant holds a fiduciary position, I agree with what is as stated by Gopal Sri Ram JCA in the case *Kerajaan Negeri Selangor & Ors v Sagong Tasi & Ors* [2005] 6 MLJ 289, at p 314:

In a system of parliamentary democracy modelled along Westminster lines, it is parliament which is made up of the representatives of the people that entrusts power to a public body. It does this through the process of legislation. The donee of the power - the public body - may be a minister of the Crown or any other public authority. The power is accordingly held in trust for the people who are, through parliament, the ultimate donors of the power. It follows that every public authority is in fact a fiduciary of the power it wields. Sometimes the power conferred is meant to be exercised for the benefit of a section or class of the general public, as is the case here. At other times it is to be exercised for the general good of the nation as a whole, that it to say, in the public interest. But it is never meant to be misused or abused. And when that happens, the courts will intervene in the discharge of their constitutional duty.

[16] There is no allegation by the plaintiffs that the minister had misused or abused his power in issuing the direction. There is in fact no impediment to the plaintiffs from making an application for a writ of certiorari to quash the decision of the minister as there is no 'ouster clause' for judicial review in the Land Code. Since there is no challenge I can only assume that there has been no abuse or misuse of power by the minister.

[17] Arising from this fiduciary position which the first defendant holds, learned counsel also submitted that there must be a consultation with the plaintiffs before the

extinguishment of the native customary rights. This submission was premised on the constitutional requirement of procedural fairness. My answer to this submission lies with what was stated in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and other appeals* [1996] 1 MLJ 481 at p 537:

> Land acquisition cases best illustrate the feasibility postulate. If the constitutional requirement of procedural fairness is insisted upon in every case where property is acquired through State action, public administration -would grind to a halt as would the development of the country. It would result in the necessity of holding an inquiry to determine the propriety of acquisition even in a case where a few square feet of land is required to widen a public thoroughfare. In recognition of the disastrous consequences that would ensue from an inflexible approach, Parliament has properly confined the right to procedural fairness to the issue of adequate compensation in cases where private property is acquired by the State. The decision of the Federal Court in *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors.* [1982] 1 MLJ 204 exemplifies the need for maintaining the feasibility restriction in the field of procedural fairness.

Issue 1

[18] The relevant facts for this issue are as stated in item 6.4 of encl 93. However to make this judgment itself a complete one, I shall briefly set out the facts here and they are these. The first defendant through the minister issued the direction to extinguish the plaintiffs' native customary rights in area of land situate at Ulu Batang Tatau, Tatau described on the Plan Print No 73/9D/8/96. Pursuant to the direction, the 16 plaintiffs submitted their claims for compensation (for extinguishment) of their NCR to the superintendent who made certain findings as to the compensation amount to be paid. The plaintiffs were not satisfied with the awarded compensation and through their own advocates, Messrs MS Sandhu & Company Advocates, required the superintendent to submit their claims for compensation to arbitration, under s 5(4) of the Land Code and in accordance with the terms of the direction, the Chief Judge of the High Court in Sabah and Sarawak on the 8 January 1998 appointed one Encik Awang Kerisnada bin Awang Mahmud as the arbitrator. On 8 November 1998, the plaintiffs solicitors applied for a stay of the arbitration pending disposal of a suit filed in Kuching, namely Originating Summons No 24–189–98-III(I) filed by Messrs Baru Bian, Advocates & Solicitors. The aforesaid suit challenges the validity and constitutionality of the direction. The learned judge in High Court I on the 23 March 1999 ordered the aforesaid originating summons be converted to a writ. Instead of doing so, they withdrew the same and filed the present suit.

[19] The plaintiffs' main thrust is the unconstitutionality of the impugned sections. This goes to the very root of the legislation and if I had found that the impugned sections to be unconstitutional, the plaintiffs could not have been deemed to have accepted the extinguishment of the native customary rights for the obvious reason that one cannot concede to something which is illegal under the Federal Constitution. So accordingly I hold that the plaintiffs are not prohibited from challenging the impugned sections on constitutional grounds. However in view of my finding of issue 4, the question which arises now is whether or not the plaintiffs can still pursue prayer one of the statement of claim which states as follows:

A declaration that the purported extinguishment of the plaintiffs' native customary rights, pursuant to the land (Extinguishment of Native Customary Rights) (Pulpwood Mill Site at Ulu Batang Tatau) (No 3) Direction 1997 made by the Minister for Resource Planning in Sarawak Government Gazette Notification No 388B on the 13th day of February 1997, is bad and null and void;

(See p 16 of Bundle of Pleadings)

[20] On this issue, I agree with learned counsel for the first defendant when she in her submission (enclosure 93) cited the case of in *Re Lord Chesham Cavendish v Dacre* [1886] 31 Ch D 466, where Chitty J at p 473 held:

The principle on which the doctrine of election is based is that a man shall not be allowed to approbate and reprobate; that if he approbates he shall do all in his power to confirm the instrument which he approbates. The consequences of such a principle cannot be legitimately carried beyond the principle itself, if a man approbates, his obligation is confined to his adopting the instrument as a whole and abandoning every right inconsistent with it. In all the leading authorities the principle is stated substantially to the effect above given, and, so far as I am aware, where the election has been to take under the instrument there is no decision decreeing compensation.

[21] Further, the plaintiffs in prayer 1 of the statement of claim had in substance challenged the decision of the minister which in my view is a disguise for an application for a writ of certiorari. That being the case, the plaintiffs ought to have applied for judicial review of the decision of the minister under O 53 of the RHC. This action falls foul of the principle of law set out in the case of*Shaharuddin bin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor* [2005] 2 MLJ 555 where Clement Skinner J said:

So although the plaintiffs say that the native customary rights which they claim to have acquired (through persons who had created those rights before 1958) are proprietary in nature, the fact remains that the rights which they claim are rights created or recognized by statute, or put in another way, they are rights protected by public law. The plaintiffs' alleged native customary rights do not arise out of any private contract or arrangement between the plaintiffs and the government (the defendants here), or put in another way, there is no infringement of a right of the plaintiffs arising under private law.

It is for the above reasons that I agree with the contention of counsel for the defendants that the plaintiffs' remedy to enforce or protect rights created or acquired or recognized in accordance with the provisions of the Land Code must be sought under public law and not private law. That being the case, the plaintiffs here should have proceeded to seek judicial review of the minister's direction and first defendant's decision under O. 53 RHC, unless of course they can bring themselves within the exceptions to the general rule stated in *O'Reilly v Mackman* which is the next question I will address.

[22] If I may add here, the facts in *Shaharuddin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor* are quite similar to the present case.

In that case, the plaintiffs had also submitted their claims for compensation to the first defendant who rejected the claims and referred the matter for arbitration under s 212 of the Land Code. Not satisfied with the first defendant's action, they commenced an action for several declarations, inter alia, that they had rights over the said lands and that the direction and reference to arbitration was null and void. Hence the principles stated therein are applicable and adopted by me in this case. Based on aforesaid grounds, I answer issue 1 in the affirmative.

Issue 2

[23] The plaintiffs' contention is made on the assumption that the impugned sections are constitutionally valid and is simply this. The impugned sections concern an extinguishment of native customary rights which are fundamental rights protected by the Federal Constitution and hence one must imply in them that the extinguishment must be 'fair, just and reasonable, containing safeguards reflecting the fiduciary duty owed by the state to the natives'. The safeguards as submitted by counsel are rights to be heard and consulted and also the state's duty to give reasons for its action. What I think the plaintiffs' learned counsels are asking the court to do is to adopt a purposive interpretation to the impugned sections. Whether or not I can accede to the aforesaid request depends what the law on construction of legislation is.

[24] The law on construction of statute is clear and it is this. In construing any statute, the first task is to look at the words in the legislation and apply the plain meaning of the words in the statute and if there is no ambiguity to the words used, the court is duty bound to accept it even if it may lead to mischief. The rationale is simple. The court's duty is not to legislate, that duty lies with the parliament. If however the words used are not clear, then the courts may adopt the purposive approach in construing the meaning of the words used (see *Public Prosecutor v Tan Tatt Eek and other appeals* [2005] 2 MLJ 685) Another principle of interpretation of statute is that the impugned sections should be viewed as a whole. That is to say that in interpreting the impugned sections it must be done with reference to the context and other sections of the Act, so as to make the whole statute consistent (see *Shim Tshun Fatt v Public Prosecutor* [2001] 5 MLJ 40). Applying the above principles I, in construing impugned sections, take into consideration of s 15A(1) and (2) which states as follows:

Section 15A

(1) Subject to the direction of the minister and the provisions of Part III, the Director may

(a) alienate any land which has been reverted to the government pursuant to s 5(3) and (5); or

(b) re-alienate any alienated land which has been surrendered to or resumed by the government under Part IV, for any of the purposes specified in s 46, to any person, corporation or body of persons approved by the minister.

(2) Whenever any land referred to in subsection (1) is alienated or re-alienated, as the case may be, such land shall not at any time be used for any purpose other than the

development or undertaking which is in the opinion of the minister is for the benefit of the state or any part thereof or of the public generally or any class of the public. A

[25] What the above sections provide for is this. The first defendant can extinguish native customary rights only if the land is required for development or undertaking which is in the opinion of the minister is for the benefit of the state or any part thereof or of the public generally or any class of the public. So the only reason for any extinguishment must be for the benefit of the state or a public purpose. It is not disputed by counsels on both sides that there is no specific provision requiring the first defendant to disclose the purpose of the extinguishment which in my view is understandable as there can be only one purpose for extinguishment, which is a public purpose. Be that as it may, one can and should imply from the above sections that the minister is under a duty to disclose the reason of the extinguishment and failure to do so would be a breach of a statutory duty on the part of the minister. My rationale for implying such a duty is simply that it is a basic constitutional right of every citizen to be informed of the reason whenever their rights are being affected by any public body, otherwise their constitutional rights to challenge would be meaningless. In the present case, the minister in the direction did refer to the use of a 'Pulpwood Mill Site at Ulu Batang Tatau', and in my view the minister had by the aforesaid reference complied with his statutory duty to disclose. There is no necessity to state that the 'Pulpwood Mill Site' is for a public purpose as the law deems it to be so. Whether or not the intended purpose is a public purpose is subject to challenge in the courts by the plaintiffs, which brings me to issue 3 which concerns the manner in which the minister's decision was challenged. B C D E

Issue 3

[26] The way in which this issue is framed is nothing but a disguise of 'a writ of certiorari' to quash the decision of the minister in issuing the direction on the ground that the purpose of the extinguishment of the plaintiffs' native customary rights was not for a public purpose. In the words of the plaintiffs' counsel in encl 106 at pp 7–8: F

PURPOSE OF EXTINGUISHMENT G

13. Section ISA is the provision which states the purposes for which extinguishment of NCR are allowed. Section 46 does not apply as its application is limited to acquisition of land under Part IV of the code which relates to lands belonging to persons other than natives. Paras 7 to 10 under issue 3 of the main submissions are repeated.

14. In any event, even if we accept the first defendant's reference to s 46(a) and (g) in relation to what public purpose is, on the facts of this case, upon consideration of the joint venture agreements, it is clear that very little is gained by the state from the venture. H

15. Here it is claimed that since STIDC is involved it is claimed that that proves that the pulp mill would amount to a public purpose.

16. The following are among the salient provisions: I

16.1 there are two joint venture agreements — the first between Asia Pulp & Paper Company Ltd ('APP') and STIDC to set up Borneo Pulp Plantation Sdn Bhd ('Landco') (starting from p 526 of Bundle of Documents exh C);

16.2 the second joint venture is between APP, STIDC, Landco to set up the second defendant (starting from p 526 of Bundle of Documents exh C);

16.3 APP is a company incorporated under the laws of Singapore (p 531);

16.4 the shareholding in Landco is 70% to STIDC and 30% to APP (p 617);

16.5 shareholding in the second defendant 60% APP, 20% STIDC and 20% Landco (p 543);

16.6 STIDC will procure an industrial forest lease, to be held by Landco who will in turn give a sub lease to the second defendant, and a pulp mill lease to be held by the second defendant (pp 552 and 624);

16.7 there will be 11 directors in the second defendant, six of whom (including the chairman of the board) must be from APP (pp 560 and 561);

16.8 a CEO for the second defendant will be appointed from the directors appointed by APP and the responsibility for day to day management shall be vested in such persons as appointed by APP (p 568).

17. Based on the above it is clear that STIDC only has a minor role to play in the venture with the control of the business and the bulk of the profits resting in APP, a Singaporean company. This is further compounded by the fact that should any dispute arise between the parties to the joint venture setting up the second defendant, arbitration proceedings will be held in Singapore and the law applicable will be that of Singapore (p 588).

18. The party that will substantially benefit from the venture and control the same is a privately owned foreign company. STIDC has no control over the venture. It cannot be said to be in furtherance of a public purpose or in compliance of s ISA or 46(a) and (g)

[27] Earlier in my judgment when dealing with Issue 1, I had held that the plaintiffs had ran foul of the principle of law expounded in *Shaharuddin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor* when they did not use the judicial review route in quashing the minister's decision. On the same grounds as aforesaid, I hold it would not be proper for me to deal with this issue. It would not go amiss to remind ourselves the importance of taking the judicial route by quoting what Lord Diplock said in *O'Reilly v Mackman* [1983] 2 AC 237 at pp 280–281:

> On the other hand as compared with an action for a declaration commenced by writ or originating summons, the procedure under O 53 before and after 1977 provided for the respondent decision - making statutory tribunal or public authority against which the remedy of certiorari was sought protection against claims which it was not in the public interest for court of justice to entertain.
>
> First leave to apply for an order was required. The application for leave which was ex parte but could be, and in practice often was, adjourned in order to enable the proposed respondent to be represented, had to be supported by a statement setting out, inter alia, the grounds on which the relief was sought and by affidavits verifying the facts relied on: so that a knowingly false statement of fact would amount to the criminal offence of perjury. Such affidavit was also required to satisfy the requirement of uberrima fides, with the consequence that failure to make on oath a full and candid disclosure of material facts was of itself aground for refusing the relief sought in the substantive application for which leave had been obtained on the strength of the affidavit. This was an important safeguard, which is preserved in the new O 53 of 1977. The public interest in good administration requires

that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision — making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision. In contrast, allegations made in a statement of claim or an indoresement of an originating summons are not on oath, so the requirement of a prior application for leave to be supported by full and candid affidavits verifying the facts relied on is an important safeguard against groundless or unmeritorious claims that a particular decision is a nullity. There was also power in the court on granting leave to impose terms as to costs or security.

Further, as O 53 was applied in practice, as soon as the application for leave had been made it provided a very speedy means, available in urgent cases within a matter of days rather than months, for determining whether a disputed decision was valid in law or not. a reduction of the period of suspense was also effected by the requirement that leave to apply for certiorari to quash a decision was made, unless delay beyond that limited period was accounted for to satisfaction of the judge. The period was six months under the pre 1977 O 53; under the current O 53 it is further reduced to three months.

[28] One can see from the above that the public interest of good public administration requires any challenge to any decision of public authorities be dealt with speedily. What had happened in this case is that the parties had been kept in suspense for some six years which in my view does not bode well for good administration. It is not fair to the third party/ second defendant investor in this case, which had invested millions of ringgit into this project to wait for so long to know their fate. Fortunately or unfortunately in this case, the second defendant met its own fate before this matter could be adjudicated on. It also does not give confidences to any investor be it foreign or local to invest in this state if parties like the plaintiffs can take their sweet time to challenge the decision of the minister.

[29] Even if I am wrong in my above finding, for the plaintiffs to successfully challenge the direction, they must put before the court some evidence of bad faith or abuse of power on the part of the minister which they had not done so. The agreed facts set out in item 9 of encl 95 contain no such allegation. One must bear in mind that the Sarawak Land Code empowers the minister to form his or her opinion what that 'public purpose' is. To impugn that opinion, there must be evidence of abuse of powers or some element of bad faith on the part of the minister. On the facts before me, I cannot say that there has been such an abuse. It is an undisputed fact that the Pulp and Paper project (project) was spearheaded by STIDC, a statutory body of Sarawak with the requisite expertise provided by Asia Pulp and Paper Ltd. Had the project succeeded it would have created ample employment opportunities for Sarawak, enhance its economy and reduced the country dependency on imported papers. These factors are valid considerations in forming an opinion whether or not the project was a public purpose project. The fact that STIDC was not a majority shareholder in the second defendant or that they have only a minimal role to play in management cannot be determining factors in saying that the project was not for the public purpose. Accordingly the answer to this issue is in the affirmative. For all the

A reasons stated above, I dismiss the plaintiffs' claim with costs to the first defendant to be taxed unless agreed.

Plaintiff's claim dismissed with costs to be taxed unless agreed.

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Reported by Sally Kee

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